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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Opinions Below

The opinion of the Virginia Supreme Court dated March 4, 1977 is set forth in the Appendix at p. 55a and is reported at 217 Va. 699, 233 S.E.2d 120 (1977). The order of the trial court dated January 15, 1976 finding Landmark Communications, Inc. ("Landmark") guilty as charged and imposing a fine of $500 is set forth in the Appendix at p. 50a and is unreported.

Jurisdiction

On November 5, 1975, a grand jury in the Circuit Court of the City of Norfolk, Virginia returned a true bill indicting Landmark for having "unlawfully divulge[d]", in violation of Va. Code § 2.1-37.13, "the identification of a Judge of a Court not of record, which said Judge was the

subject of an investigation and hearing by the Judicial Inquiry and Review Commission." (JA 3)* Landmark moved to quash and dismiss the indictment alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that it could only be applied to Landmark in violation of the First Amendment to the United States Constitution. (JA 4) On December 10, 1975, the trial court overruled Landmark's motion to quash and dismiss the indictment (JA 48) and Landmark was tried before the court sitting without a jury. On January 15, 1976, the trial court found Landmark guilty as charged. (JA 50) On January 29, 1976, Landmark filed its Notice of Appeal and Assignments of Error alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that said section could only be applied to Landmark in violation of the First Amendment to the United States Constitution. On March 4, 1977, the Supreme Court of Virginia rendered its decision affirming Landmark's criminal conviction and rejecting its constitutional arguments.

A Notice of Appeal was filed on April 15, 1977. This Court noted probable jurisdiction on June 13, 1977.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by 28 U.S.C. § 1257(2) (1970).

Questions Presented

(1) May a newspaper, consistent with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for

* References to "JA—" are to the appropriate pages of the Appendix agreed upon by the parties to this action and filed with this Court.

its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming, *arguendo*, that a newspaper may ever be convicted and subjected to criminal sanctions for such a publication, may it, consistent with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Va. Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Va. Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

"The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.

"If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.

"Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.

"If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature of and rules relating to the Virginia Judicial Inquiry and Review Commission (the "Commission"). Section 2.1-37.13 provides, in relevant part, as follows:

"All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11 ['Order compelling witness to attend and testify'], 2.1-37.12 ['Depositions']), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . . .

"All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

"Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Code of Virginia.

Pursuant to Va. Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

Statement of the Case

(a) *Matters Leading to the Noting of Probable Jurisdiction*

On October 4, 1975, *The Virginian-Pilot*, a newspaper published by Landmark, printed on the first page of its second section an article which accurately identified and reported about a judge who had been investigated by the Commission. The article stated that "[n]o formal complaint has been filed by the commission" against the judge, "indicating either that the five-man panel found insuffi-

cient cause for action or that the case is still under review." (JA 47)

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for the publication of the October 4 article. The Grand Jury charged that Landmark "did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission. (JA 3)

Trial was had on December 10, 1975, after the denial by the trial court of Landmark's motion to quash and dismiss the indictment. (JA 48) The only evidence introduced by the Commonwealth (other than the charter, articles of amendment, last annual report of Landmark and the October 4, 1975 issue of *The Virginian-Pilot*) was a Stipulation of Evidence stating that Landmark was a Virginia corporation which publishes *The Virginian-Pilot;* that on October 4, 1975, Landmark published an article which identified a judge who had been investigated by the Commission; and that at the time of the publication of the article, the Commission had not filed a formal complaint concerning the judge with the Supreme Court of Virginia. (JA 6)

The only witness who testified at the trial was Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*. He testified that he made the decision to publish the article because (1) a complaint had been filed against the judge many months prior to the hearing before the Commission and (2) the news was of such importance that it should be brought to the attention of the public. Mr. Dunn stated that he was aware that it was a misdemeanor for individuals who participated in the proceedings before the Commission to reveal information concerning the proceedings, but that he had not understood the statute to apply to newspaper reports about proceedings before the Commission. He further testified that no reporter, employee or agent of Landmark had been subpoenaed before or otherwise participated in the proceedings before the Commission. (JA 42-43)

On January 15, 1976, the trial court found Landmark guilty as charged. Its Order did not deal with, or even refer to, the statutory and constitutional arguments made by Landmark. Instead, the Order simply concluded that "the Court doth find the defendant Guilty as charged," fixing punishment at $500 and requiring Landmark to pay the costs of prosecution. (JA 50)

The March 4, 1977 decision of the Supreme Court of Virginia affirming the conviction of Landmark by a 6-1 vote characterized the case as involving a "confrontation" between the First Amendment and Va. Code § 2.1-37-13. (JA 55) After holding that the statute "[c]learly" applied to Landmark and extended to "all information concerning a proceeding before the Commission," the Court dealt with the direct confrontation between the statute as so interpreted and the First Amendment, acknowledging that the matter was "serious" and "important" and that it presented "an issue not decided previously by this Court, or so far as our research discloses, by any other appellate court in this country." (JA 59-60)

Viewing the case as one involving "subsequent punishment" rather than prior restraint—a conclusion with which we do not quarrel on this appeal—the Court purported to apply a clear and present danger test in the following fashion: it conceded that Landmark could not be punished for "publishing the confidential information contained in the article" unless the revelation created "a clear and

present danger to . . . the orderly administration of justice"; it held that the statute itself, one of 35 in the nation requiring confidentiality with respect to judicial inquiry commissions,* constituted an appropriate finding of such danger; and it conceded that no evidence had been adduced at trial that publication of the October 4, 1975 news article in *The Virginian-Pilot* constituted a clear and present danger to the administration of justice. The "requirement of confidentiality in Commission proceedings," the Court held:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73)

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (JA 73), the Court upheld the statute's constitutionality and affirmed the conviction.

Justice Poff dissented, concluding that the statute "should be construed not to apply to this defendant under these circumstances" and that "[c]onstrued otherwise, the statute offends the First Amendment." (JA 74)

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* The number was based on information set forth in the publication of the American Judicature Society entitled *Judicial Disability and Removal Commissions, Courts and Procedures* (G. R. Winters & R. S. Lowe, eds. 1973). As of the writing of this brief, over 40 jurisdictions have adopted some form of judicial review procedures. A listing of the applicable provisions is set forth at pp. 39n-40n, *infra*.

On April 15, 1977, Landmark filed a Notice of Appeal to this Court. Landmark's Jurisdictional Statement was filed on April 20, 1977. A Motion to Affirm the Judgment of the Supreme Court of Virginia was served by the Commonwealth of Virginia on May 20, 1977. A Supplemental Brief, setting forth certain new factual developments, was filed by Landmark on June 3, 1977. This Court noted probable jurisdiction on June 13, 1977.

(b) *Events Subsequent to the Noting of Probable Jurisdiction*

Since this Court noted probable jurisdiction, several events involving enforcement of Va. Code § 2.1-37.13 have occurred. We bring these matters to the Court's attention for informational purposes.

On June 16, 1977, an Associated Press dispatch received by *The Virginian-Pilot* reported that a Virginia judge, who previously had been investigated by the Commission, had discharged a court clerk who had testified against the judge before the Commission. The Associated Press report also indicated that a new investigation had been commenced by the Commission relating to these circumstances.

Under the terms of a preliminary injunction previously entered by United States District Judge Warriner, Richmond Newspapers, Inc., the publisher of two Richmond, Virginia newspapers, was free to publish information concerning activities of the Commission without fear of prosecution for violation of § 2.1-37.13.* The editors of *The*

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* The preliminary injunction resulted from one of several federal actions instituted by publishers other than Landmark in the wake of the decision of the Virginia Supreme Court in this matter. On March 12, 1977, eight days after the filing of the decision of the Virginia Supreme Court, United States District Judge Robert R. Mehrige, Jr. issued a temporary injunction restraining prosecu-

Virginian-Pilot considered the Associated Press story to be highly newsworthy, and were aware that the story had

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tion of a Virginia television station under the section of Virginia law passed upon by the Virginia Supreme Court and at issue on this appeal. *Nationwide Communications, Inc.* v. *Backus*, No. 77-0139-R (E.D. Va. March 15, 1977). The order expired by its own terms without further proceeding.

An order to enjoin a then pending prosecution of Richmond Newspapers, Inc. was denied on March 31, 1977 by United States District Judge D. Dortch Warriner, who stated that although he believed the statute was unconstitutional, he could not find it "patently and flagrantly unconstitutional" in light of the decision of the Virginia Supreme Court. *See Norfolk Ledger-Star*, April 6, 1977, p. A8. On April 29, 1977, Richmond Newspapers, Inc. was convicted of two violations of Va. Code § 2.1-37.13 and fined $1,000 for each violation.

On May 3, 1977, the prosecution of Richmond Newspapers, Inc. having been concluded, a temporary restraining order was entered by Judge Warriner restraining further prosecution of Richmond Newspapers, Inc. under that statute; this order was extended on May 12, 1977 and a preliminary injunction (which remains in effect) against any such prosecution of Richmond Newspapers, Inc. was entered on May 20, 1977. (SB 1a, 8a, 10a)

In granting the preliminary injunction, Judge Warriner referred to:

> "the loss to the citizens of Virginia of the opportunities of knowing what disciplinary actions are contemplated, what investigations are being made, what is being done about bad judges. They have a right to know, and a deprivation of that right is surely as damaging to the body politic of Virginia as the inconvenience that was found in the Maynard case to warrant Federal intervention there." (SB 20a-21a)

He further observed that:

> "Surely it is newsworthy that a judge is being investigated. Surely it's newsworthy that a judge is being disciplined by reprimand, informal or otherwise. That's newsworthy. And if the newspaper doesn't print that news, then it can be said that it is printing the opposite; it is saying the opposite. And in that sense, the newspaper is being forced by the State not only to say something it doesn't want to say but to say something that isn't true and thus is misleading the citizenry." (SB 21a-22a)

(References to "SB—" in this footnote are to pages of the Supplemental Brief filed by Landmark with this Court on June 3, 1977.)

been reported in other parts of the state. Nevertheless, not being protected by the explicit terms of the federal injunction (which referred only to Richmond Newspapers, Inc.), and in deference to the opinion of the Supreme Court of Virginia, they determined that it was inappropriate to print the story without a federal court order prohibiting prosecution for such reporting.

Accordingly, Landmark commenced an action by seeking a temporary restraining order against prosecution with respect to its reporting of such matters.* On June 17, 1977, an order was signed by United States District Judge J. Calvitt Clarke, Jr. enjoining such prosecution providing "the substance of such information has been published by the *Richmond Times Dispatch* or *News Leader* [publications of Richmond Newspapers, Inc.] or provided the plaintiffs have been assured that such information will be published by either of such newspapers." The order expired on June 20, 1977 and Judge Clarke refused to extend it beyond that date.

On June 21, 1977 the discharged court clerk brought suit against the judge in question, alleging that her testimony against him had been the reason for the discharge.** In light of the public nature of these charges, Landmark deemed further prosecution of its action before Judge Clarke to be unnecessary and has therefore requested leave to discontinue its action.

Summary of Argument

This case involves the effort of a state to punish the accurate reporting of information with respect to the fit-

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* *Landmark Communications, Inc., et al.* v. *Campbell*, No. 77-404-N (E.D. Va., filed June 17, 1977).

** *De Voe* v. *Turner, et al.*, No. 77-0341-R (E.D. Va., filed June 21, 1977).

ness of a public official for his position and the functioning of government itself. As interpreted by the Virginia Supreme Court, Va. Code § 2.1-37.13 makes criminal the reporting, at any time, of any information concerning proceedings before the Commission unless and until a formal complaint is filed against the judge; if no such complaint is filed, not a word about the matter may ever be published.

This Court has recently recognized that even commercial speech about lawful activities may not be suppressed, so long as it is true. When, as here, the reporting concerns the qualifications of government officials and the basic functioning of our system of government, criminal punishments for such reporting may not be countenanced. In Part I of this brief, it is urged that the First and Fourteenth Amendments preclude the imposition of criminal penalties on truthful reporting about public officials in the performance of their public duties.

Part II of this brief proceeds on the assumption, *arguendo,* that truthful speech of the sort described above could, at least in some circumstances, be punished. While the most appropriate standard, short of that set forth above, to apply to pure expression in such a case remains a subject of dispute, the clear and present danger test has been applied on occasion to cases where the interest alleged to be arrayed against the First Amendment was the protection of judicial administration. That test provides the minimum protection for free expression which may be permitted under any theory of the First Amendment. Judged by even that test, the statute is unconstitutional.

The Virginia Supreme Court identified three aspects of judicial administration which it believed were to be protected by Va. Code § 2.1-37.13: 1) preservation of the

reputation of individual judges; 2) maintenance of confidence in the judicial system; and 3) protection of witnesses before the Commission against reprisal by those under investigation. (JA 72-73) This Court has previously rejected the adequacy of the first two interests as a basis for suppressing expression. The third interest cannot, in any sense, be deemed imperiled on the facts of this case since no witnesses were identified in the disputed newspaper report. The statute is, moreover, far broader than necessary to protect any such interest. Further, whether or not the third interest is entitled to some weight as a general matter, it may be entitled to no weight with respect to the Virginia review procedures, since, under those procedures, a judge who is the subject of an investigation is likely, in any event, to learn of the identity of witnesses who have testified against him. Indeed, as actual events in Virginia have shown, press coverage of Commission proceedings has provided witnesses with protection against the risk of reprisals.

The clear and present danger test cannot be satisfied here, in any event, since no evidence whatever was adduced at trial with respect to the seriousness of the evils adverted to by the Virginia Supreme Court or their supposed immediacy under the circumstances of this case. Mere reference to the fact that legislation was adopted is insufficient to support a finding of clear and present danger, especially when—as here—the legislative history reflects no finding at all of the existence of any such danger.

In Part III, it is urged that Va. Code § 2.1-37.13 is both unconstitutionally vague and overbroad. In prohibiting divulgence of information about proceedings before the Commission, the legislature failed to make clear any intent to reach a newspaper's reporting of information given to

it by others. Further, as interpreted by the Virginia Supreme Court, the statute leaves open a number of critical questions relating to both the nature and scope of material to which the protection extends. As to the latter point, a potential critic of the judicial system is left to ponder the scope of any restriction which extends to "all information concerning a proceeding." (JA 59) Any such standard is unacceptably vague.

The language of the statute as interpreted also covers a variety of activities—including petitioning the legislature for relief, the filing of lawsuits and criticism of Commission procedures generally—which must be protected under any view of the First Amendment. In this respect, Va. Code § 2.1-37.13 is plainly overbroad and therefore unconstitutional on its face, even if it were not otherwise unconstitutional as applied to Landmark.

ARGUMENT

I.

The First Amendment Forbids the Imposition of Criminal Sanctions on a Newspaper for the Publication of Truthful Information About Public Officials With Respect to the Performance of Their Public Duties

This case raises anew a question which penetrates to the core of our concept of self-government. It is nothing less than whether the press may be punished for printing the truth about a public official in connection with his public duties. It is an old question—dating back to the Zenger trial itself—and it is one we believe this Court has long since answered.

The Virginia statute at issue in this case does not proscribe conduct; nor does it purport to limit the time, place or manner of expression. The statute is in the classic mold of unconstitutional acts: it proscribes expression itself, based solely on the content of that expression.

This Court has recognized that "[t]he constitutional guarantees of freedom of speech forbid the states to punish the use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942)." *Gooding* v. *Wilson*, 405 U.S. 518, 521-22 (1972). The classes (referred to in *Chaplinsky*) were said to include: "the lewd and the obscene, the profane, the libelous and the insulting or 'fighting' words." 315 U.S. at 572. Punishment of expression in such situations was only tolerated because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Here the Virginia statute forbids not merely the taking of a "step to truth," but the dissemination of truth itself; it punishes speech which is not merely of "social value" but which is essential to self-government. No theory of the First Amendment can permit such a statute to stand.*

It is an accepted principle of our jurisprudence that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern, without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940)

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* The First Amendment is, of course, applicable to the states through the Fourteenth Amendment. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 556 (1976).

So basic is the principle that truthful speech must be protected that, in a series of recent decisions, it has been applied to even the most mundane of commercial transactions. A state has thus been held to be constitutionally forbidden from "completely suppress[ing] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).

In that case the Court contrasted the "highly paternalistic approach" of the state in keeping its citizens in ignorance of information as to drug prices which the state thought might be used by its citizens against their own best interests, with a policy that recognized that:

> "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them." 425 U.S. at 770

The Court concluded:

> "[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.*" *Id.* (emphasis added)

The Court spoke similarly in its recent decision in *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (U.S. May 2, 1977). After noting that the statute in *Virginia Pharmacy* was unnecessary to protect the state interests involved, the Court set forth the more

fundamental premise of its decision in that case. "[I]n any event, the First Amendment disabled the State from reaching its goal by restricting the free flow of truthful information." 45 U.S.L.W. at 4444. The Court went on to reject a variety of professed justifications for the restrictions on commercial speech in holding that the First Amendment barred commercial sanctions which had the effect of "restricting the free flow of truthful information." *Id.*

In yet another recent decision in this series of commercial speech cases, *Bates* v. *State Bar*, 45 U.S.L.W. 4895 (U.S. June 27, 1977), the Court held unconstitutional bar association restrictions on truthful advertising of routine legal services. Such disagreement as there was on the Court related principally to differing assessments as to the accuracy of the particular advertisements at issue in that case and the accuracy of legal advertising generally.

In all these recent cases,* this Court identified a number of substantial interests requiring protection of truthful commercial speech, including some which the Court recognized as relevant to "public decision-making in a democracy." *Virginia Pharmacy*, 425 U.S. at 765. The Court also recognized that although commercial speech is entitled to First Amendment protection, "a different degree of protection" may be appropriate to commercial speech than is due "news reporting or political commentary." *Id.* at 772 n. 24. It thus does not denigrate the recently vindicated values of commercial speech to say that the right to publish concerning matters more intimately connected with self-government has, if anything, a still stronger and clearer call on the protections of the First Amendment. That such greater protection arises out

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* *See also Carey* v. *Population Servs. Int'l*, 45 U.S.L.W. 4601 (U.S. June 9. 1977).

of the nature of our system itself makes all the more extraordinary Virginia's efforts to punish the dissemination of the truthful information at issue on this appeal.

The Court has often recognized the centrality of the First Amendment's protection of expression about government and government officials. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254, 274-75 (1964). Indeed, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957). As eloquently set forth by Justice Brandeis in his concurring opinion in *Whitney* v. *California,* 274 U.S. 357, 375-76 (1927):

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Inherent in these concepts of the First Amendment is an understanding that ours is a form of government in

which "the censorial power is in the people over the government, and not in the Government over the people." Madison, in 4 Annals of Cong. 934 (1794), quoted in *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 275. The consequence of this understanding for liberty of the press is set out most clearly in this Court's decisions in *New York Times Co.* v. *Sullivan, supra* and *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

In *Sullivan* this Court recognized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open". 376 U.S. at 270. It took as a starting point the imperative need to protect truthful criticism of official action. But it recognized that a rule which protected *only* truth was insufficient since:

> "[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true, and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U.S. at 279

Adoption by the Court of the actual malice test was the result, a result animated by the conclusion that even some false expression must be protected in order to avoid dampening the expression of that which is true.*

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* More recent opinions concluding that civil libel laws may not be used by a public official or public figure to recover damages arising from the publication of true statements about him include *Time, Inc.* v. *Firestone,* 424 U.S. 448, 458 (1976) and *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 498-500 (1975) (Powell, *J.,* concurring).

Garrison confronted similar issues in the context of criminal libel. There, the defendant was convicted of the crime of libeling the judges of a state court bench. This Court applied the *Sullivan* rule and reversed the conviction, stating:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan*, 376 U.S., at 270." 379 U.S. at 74-75

Reviewing the history of criminal libel prosecutions and the gradual acceptance of the defense of truth as necessary to a democratic society, the Court concluded that:

> "In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 72-73

Recognizing the fundamental values at stake, the Court set forth the principle which governed its decision:

> "Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." *Id.* at 74*

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* *See also Thornhill:*

"[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." 310 U.S. at 104

Additionally, in *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court analyzed a Georgia contempt conviction based on out-of-court statements allegedly posing a threat to judicial administration. It noted the rejection as irrelevant by the state courts of defendant's efforts to prove the truth of the out-of-court statements for which he was punished. "If the petitioner could be silenced in this manner the problem to the people in the State of Georgia and indeed in all the States becomes evident." 370 U.S. at 391.

The same principle governs this case.*

In a sense, the underlying thrust of this type of statute or of any statute which protects government officials from truthful statements about their conduct is akin to the concept of seditious libel designed to protect governmental institutions against threats posed by criticism. Our nation's only—and quite sufficient—experience with such law was the Sedition Act, Ch. 73, 1 Stat. 596 (1798). The Act subjected to criminal sanction any writing or speech which was "false, scandalous and malicious" and was uttered with an intent, *inter alia*, to bring specified public officials "into contempt or disrepute; or . . . excite against them . . . the hatred of the good people of the United States." Truth

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* In crucial respects, the specific interests at stake in this case parallel those at issue in *Garrison*. There the Court rejected the protection of reputational interest as justification for any imposition of criminal sanctions on truthful speech or, indeed, any false statement not made with constitutional malice. It did so despite the fact that such sanctions had traditionally been viewed as a deterrent to a breach of the peace—at least as strong an interest as that said to be involved here. Since on the facts of this case, *only* reputational interests (whether individual or judicial) are at stake, the holding of *Garrison*, quite apart from its more general language, compels reversal.

Like *Sullivan* before it, *Garrison* also makes clear that even complete protection for the publication of truthful information may not suffice fully to protect First Amendment interests. In this case, the Court need not reach the question of the degree to which *untruthful* speech need be protected in order to avoid the risk of inhibiting truthful speech in a non-libel context.

was a defense, a concession not made by the Virginia legislature.

History—and this Court—have since judged the Sedition Act and found it unconstitutional. *Sullivan*, 376 U.S. at 273-76. Indeed, one commentator has suggested that "the presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics." Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191, 205.

While the intent of the statute in question here may not be to stifle criticism of government, that is the clear effect of the statute. As Professor Kalven noted, no state interest can justify such a statute in a free society. Indeed, the enduring contribution of *Sullivan* and its progeny may well be the recognition that any legal test which burdens truthful speech relating to public officials based on the content of such speech is simply unacceptable. The statute at issue in this case does not simply inhibit such speech; it prohibits it.

Under the statute, journalists or publishers could be fined or imprisoned if they ever printed the fact that an unfit judge who had been accused before the Commission was still sitting, or that an unfit—or corrupt—Commission had covered up for the judge. And, as in this case, the mere accurate reference in a news article to the name of a sitting judge against whom charges had been filed would be criminal—notwithstanding the recent admonition in Justice Brennan's concurring opinion in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) that:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

A multitude of hypothetical examples of the dangers posed by the Virginia statute could be offered, but those dangers are most starkly illustrated by two actual events which occurred shortly after the noting of probable jurisdiction in this case.

As noted above (pp. 9-11), the Associated Press reported that a sitting judge of Virginia, who had been the subject of an investigation by the Commission, had fired a court clerk who had given testimony against the judge before the Commission. It also reported that a new investigation had been convened to investigate the firing. Absent the issuance of the temporary restraining order by Judge Clarke, Landmark would have been forbidden, upon pain of criminal sanctions, from informing its readers of these facts, facts vital to any evaluation of the fitness of the judge, the Commission itself, and the workings of the justice system generally.

Additionally, late in June, a Justice of the Texas Supreme Court was indicted for perjury and forgery and accused of (but not indicted for) plotting to murder a

former business associate. In the wake of these allegations, it was also reported that the Texas State Judicial Qualification Commission would convene a hearing on the various charges against the Justice in question.* If the same events had occurred in Virginia, not a word about the prospective proceeding could have appeared in the state's newspapers.**

No theory of the First Amendment would sanction criminal prosecution for the publication of information concerning either of these investigations. As Mr. Justice Black stated:

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971) (Black, J., concurring)***

* The New York Times, July 1, 1977, p. A8, col. 5.

** Significantly, Texas has a constitutional provision requiring proceedings before that Commission to be confidential. Texas Const. Art. 5, § 1-a(10). The Texas Commission either did not consider the disclosure to be a violation of its laws or concluded that the paramount interest in assuring the public that an investigation was underway required disclosure.

*** The vital role which the press plays in reporting on and thereby checking governmental excess has long been recognized by this Court. In *Mills* v. *Alabama,* 384 U.S. 214 (1966), the Court observed that: "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote

To agree with Mr. Justice Black that the protected role of the press is to "bare the secrets of government and inform the people" need not, of course, be to preclude government from striving, by control of its own personnel, to retain those secrets.* But, as Alexander Bickel wrote:

> "[G]overnment may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress." A. Bickel, *The Morality of Consent* 80 (1975)

Precisely the same, we believe, may be said of this case. The Commission may withhold and keep secret what it

to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." 384 U.S. at 219. *See also* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 634 (1975).

* Control of Court personnel is thus available to preserve the secrecy of this Court's deliberations. *Cf. New York Times Co.* v. *United States, supra,* 403 U.S. at 752 n.3 (Burger, C.J., dissenting). *See also City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 178 (1976) (Brennan, J., concurring).

This case does not, of course, raise questions as to the right of the press to obtain access to governmental documents.

can; the press may print what it learns.* *See generally* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975). To the extent Va. Code § 2.1-37.13 is read to the contrary, as it was by the Supreme Court of Virginia, it is unconstitutional.

II.

Assuming, *Arguendo*, That Truthful Reporting About Public Officials in the Performance of Their Public Duties May Ever Be Punished, No Clear and Present Danger Exists Justifying Such Punishment Under This Statute

Few areas of the law have stirred as much dispute as the attempts of the courts to reconcile the explicit language of the First Amendment with legislatively or judicially perceived needs for restrictions on the rights of free expression. Where, as here, government regulation is aimed directly at speech, rather than action, and where the speech is tied so directly to the process of governing, the rule set forth in *Garrison* that "[t]ruth may not be the subject of . . . criminal sanctions where the discussion of public affairs is concerned" (379 U.S. at 74), seems to us much the most appropriate. Under that test, of course, the Virginia statute would be flatly unconstitutional. We believe, however, that judged by any of the other approaches employed by this Court in recent years

* We recognize, as did Professor Bickel, the limitations on this principle which may arise in the unique circumstances discussed in *New York Times Co.* v. *United States, supra*. Issues of national security, that is, matters which relate to the survival of our nation, have been accorded a distinct status in our jurisprudence. *See Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). They are so far removed from the present context that we believe they need not be considered here in formulating a rule applicable to the broad range of state regulatory action which does not touch upon such matters.

the statute, both on its face and as applied here, would, as well, be unconstitutional.

Where First Amendment rights are directly threatened, this Court will engage in the most exacting scrutiny of the legislation. *See Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

No one rule short of that set forth in *Garrison* seems to take full account of these requirements. Perhaps the single standard which has most often been used—and as often condemned by members of this Court itself and legal commentators—in evaluating restrictions on First Amendment rights is some form of clear and present danger test. First articulated by Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47, 51-52 (1919), the standard has been employed in the quartet of contempt cases in which an attempt was made to sustain contempt convictions based on out-of-court writings on the ground that such expression constituted an unacceptable threat to the administration of justice. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).* The Virginia Supreme

* The language at issue about the judiciary in those cases was in many respects offensive and in some untrue. The editorials at issue in *Bridges* (entitled "Probation for Gorillas?") all but demanded that probation not be granted to two union members who had been found guilty of assault (314 U.S. at 271-72); the cartoon and editorial at issue in *Pennekamp* "wondered"—in a fashion which this Court agreed was unfair—whether the courts were being "subverted into refuges for lawbreakers" (328 U.S. at 337 n.4);

Court purported to base its analysis on this standard as well.

While we again emphasize our belief that this standard does not provide adequate protection against a statute aimed at truthful reports about public officials, we believe that analysis of the present statute and of the facts of this case under such a standard reveals the patent unconstitutionality of the statute and the need for reversal here.

A. *The Evils the Virginia Statute Would Protect Against Do Not Justify Restrictions on Truthful Reporting and Cannot Satisfy the Clear and Present Danger Test*

In affirming the conviction of Landmark, the Virginia Supreme Court identified three interests which it believed were served by the "requirement of confidentiality in Commission proceedings." The Court held that such confidentiality:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73)

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the editorials in *Craig*, during the pendency of a motion for a new trial, accused the elected layman judge of "arbitrary action" and of committing a "travesty on justice" in his earlier rulings which he was then reconsidering (331 U.S. at 379-80); and the offending language in *Wood* accused a judge of charging a then sitting grand jury "in the style and language of a race baiting candidate for political office" (370 U.S. at 380). All these cases involved the articulation of harsh opinions about the judiciary—not, as in this case, the statement of uncontestedly accurate facts.

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (JA 73), the Court upheld the statute's constitutionality and affirmed the conviction.

One need not quarrel with the legislative goals adverted to by the Court to suggest the inadequacy of such interests to support criminal sanctions for truthful reporting with respect to investigations of judges by the Commission.

The first and second interests—the protection of a judge's reputation and the need to preserve confidence in the judiciary as a whole—are obviously closely related. These interests are significant; but they are wholly insufficient to support sanctions on truthful reporting about individual judges or the judiciary as a whole. As we have observed, preservation of judicial reputation has been held to be an inadequate basis for criminal punishment of speech or reporting, at least absent proof of falsity and of constitutional malice, neither of which is alleged here. The Court in *Sullivan* stated that: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." 376 U.S. at 272.* *And see Garrison* v. *Louisiana, supra.*

This Court has also shown a healthy disbelief for the proposition that respect for the judiciary as an institution can be encouraged by silencing potential critics.

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public

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* Indeed, as this Court noted in *Craig* v. *Harney*, 331 U.S. at 376:

"Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

> opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges* v. *California*, 314 U.S. at 270-71

It is noteworthy that Mr. Justice Frankfurter, dissenting from the reversal of the conviction for contempt in *Bridges*, did so on a basis wholly inconsistent with that articulated by the Virginia Supreme Court in upholding this statute. He stated:

> "The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal." *Id.* at 291-92 (Frankfurter, J., dissenting)

The Virginia statute, however, seeks not to protect the rights of litigants before the judges (a matter dealt with at length in this Court's recent *Nebraska Press Ass'n* ruling), but the reputational and institutional interests of judges themselves. This is simply not a purpose which

may be achieved at the price of penalizing First Amendment interests.

Only the third of the Virginia Supreme Court's justifications for the statute remains. The protection of witnesses against retribution for appearing before the Commission is indeed a significant interest. It is, however, not even directly implicated in this case which involves the identification of a judge and not a witness against him. And the statute appears, in any event, ill-designed to serve that interest.

The statutory scheme itself appears to defeat the goal. It apparently* provides the judges with access to the testimony of the witnesses against him even at the preliminary Commission stage. *See, e.g.*, § 2.1-37.12.** While this clearly protects the rights of the judge, it does undercut any protection as to the identity of witnesses and makes them potential targets of retribution if a judge is so inclined. That such possibility exists is, in fact, illustrated by the allegation referred to above that a judge ordered the dismissal of a court clerk for testifying against him at a Commission hearing. Press coverage of the dismissal, logically, would seem to represent a check on this danger apparently inherent in the legislative approach itself. Under the statutory scheme, however, a witness or a court official harassed by a judge as a result of testimony given

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* One problem posed by the Virginia statute is that the criminal sanction on disclosure of information makes it all but impossible to examine the procedures actually used in proceedings before the Commission.

** This section requires that any depositions, for example, be taken in a manner acceptable to the judge or his counsel. If agreement as to this cannot be reached, recourse to the courts may be had. While it seems implicit that the judge and his counsel may have access to the deposition itself, it is, at any rate, made explicit that in any dispute as to the manner of taking the deposition, the court record shall reveal the name of the witness.

before the Commission would be precluded from revealing this fact to the newspapers or anyone other than the Commission—a practice hardly calculated to protect such witnesses. Thus, even if a reference to witnesses had been made here, as it was not, the protection of witnesses against retribution could hardly be a basis for sustaining the statute.*

The restriction on reporting is, additionally, far from the narrowest means of protecting witnesses. Lawyer-witnesses might be protected by disqualification rules as to judges under investigation; other witnesses might be protected by monitoring programs. Thus the restriction on expression is not even "necessary to avoid the danger." *Dennis* v. *United States,* 341 U.S. 494, 510 (1951). And, the failure to use the least restrictive means to accomplish the legislative goal itself dooms any statute. *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976); *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). As this Court stated in *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973):

> "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. . . . 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . .' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

* It is difficult to comprehend why, in any event, witnesses require less protection once public charges are filed against a judge. Certainly to the extent it is assumed that publicity attending the filing of charges before the Supreme Court would deter recriminations, the same rationale would impel more—not less—publicity at earlier stages when witnesses are more vulnerable.

Thus the gravity of the evil the statute would protect against, as set forth by the Virginia Supreme Court, is insufficient to allow the statute to survive a clear and present danger test even if the imminence of such threatened evil were great. In fact, however, neither the imminence of the danger nor the substantiality of the evil were established by evidence here and this fact itself renders application of the statute unconstitutional.

B. *No Finding of an Imminent Danger May Be Made Here in the Absence of Any Evidentiary Record to Support Such a Conclusion*

There is a further infirmity in any attempt to sustain the conviction here under any formulation of a clear and present danger test.* At the very least, application of that test requires proof of *actual* facts that the specific expression in question created a danger of such immediate and grave magnitude that it could be punished. "[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges,* 314 U.S. at 262. This Court in *Craig* left no doubt concerning the standards:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376

* The conclusion of the Supreme Court of Virginia as to the existence of a clear and present danger is in no sense binding on the Court. Precisely such a conclusion was rejected by this Court, in the strongest terms, in *Wood.* More recently, this Court has overruled such findings of state supreme courts in *Nebraska Press Ass'n* v. *Stuart, supra* and *City of Madison* v. *Wisconsin Employment Relations Commission, supra.*

By no interpretation can the Commonwealth's evidence be deemed to establish by actual facts that the publication of the judge's name and the fact he had been investigated constituted a clear and present danger to the administration of justice, which danger was substantial and imminent. Indeed, the opinion of the Virginia Supreme Court concedes as much. (JA 66)

In this Court's scathing denunciation of a state court's failure to produce evidence and the trial court's failure to make any findings or to give any reasons how the statements in *Wood* actually interfered with the administration of justice, the Court stated:

> "Despite its conclusion that the petitioner's conduct created a serious evil to the fair administration of justice, the Court of Appeals did not cite or discuss the *Bridges, Pennekamp* or *Harney* cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger. It simply adopted as conclusions of law the allegations made in the contempt citation. The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was

> responsible for its failure. . . . What interference to petitioner's hearing or what harm this assertion might inflict on the administration of justice is not stated in the opinion. Nor is there any evidence of either in the record.
>
> "Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us." 370 U.S. at 386-88 (emphasis in original)

The demands made by the Court in *Wood* may be made of the Commonwealth in the instant case. Nowhere did the Commonwealth demonstrate how the publication interfered with the administration of justice. As in *Wood*, no prosecution witnesses were called to show how the functioning of any court or investigative body was or would be disturbed. In fact, here the Commonwealth called no witnesses at all. There was no showing that the Commission's proceedings were or would be in any fashion interfered with and, if so, how Landmark's conduct was responsible for the interference. There was no showing that any of the interests referred to in sustaining the statute were, in fact, imperiled by the prohibition in question.

The holding of the Virginia Supreme Court as to the existence of a clear and present danger to the administration of justice caused by publication of Landmark's article is thus completely unsupported factually; it cannot obtain such support from the mere adoption of the statute at issue.

At the heart of the ruling of the Virginia Supreme Court is the conclusion that the Virginia legislature—as well as

many other legislatures—found a clear and present danger to the administration of justice in the publication of articles such as are at issue here. The Virginia Supreme Court held that the restrictions on reporting came to it in "'the armor wrought by prior legislative deliberation.'" *Bridges, supra,* 314 U.S. at 261. (JA 69) Legislative determination that a clear and present danger exists may not substitute for actual proof of imminent danger on the facts of the case, even where such determination has been made.

The concept of presumptive validity of legislative enactments, appropriate in other contexts, has no applicability to direct restrictions on the contents of speech. Indeed, this Court has, since *Bridges,* recognized that where such fundamental rights are at stake, the burden is on the state to support its action. *See Elrod* v. *Burns,* 427 U.S. 347, 362 (1976).

The dictum in *Bridges* as to the significance to be accorded legislative deliberation seems to stem from the determination in *Gitlow* v. *New York,* 268 U.S. 652 (1925) where this Court deferred to the legislature when that body found particular categories of words required the imposition of criminal sanctions. *Id.* at 670-71. Justices Holmes and Brandeis dissented from this approach, requiring, as had Mr. Justice Holmes in first articulating the test, that the clear and present danger test be applied to the facts of every case.

> "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, . . . the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free

> speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney* v. *California,* 274 U.S. at 378-79 (Brandeis, J., concurring)

The views of Justices Brandeis and Holmes were accepted as correct in *Dennis* v. *United States, supra,* 341 U.S. at 506-07 (opinion of Vinson, C.J.), 536-37, 541 (Frankfurter, J., concurring) and the clear and present danger test was applied to the facts of the particular case. 341 U.S. at 507-08. *See also* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto,* 22 Stan.L.Rev. 1163, 1173 (1970).

In recent decisions this Court has freely judged the constitutionality of statutes restricting speech without deference to the fact of the statute's legislative enactment. *See, e.g., Cox Broadcasting Corp.* v. *Cohn, supra; Linmark Associates, Inc.* v. *Township of Willingboro, supra.* In the recent commercial speech cases, statutes were overturned as unconstitutional infringements of the First Amendment, notwithstanding legislative findings and explicit testimony offered in the trial court in support of the legislation. *See, e.g., Linmark Associates,* 45 U.S.L.W. at 4442; see also, the detailed stipulation of facts in *Virginia Pharmacy.* Particularly in the absence of any legislative history or findings as to the need for criminal sanctions, according deference to, let alone blind acceptance of, the legislature's judgment, is unacceptable. *See Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 107 (1952).

In any event, there is absolutely nothing in the legislative history of the adoption of Va. Code § 2.1-37.13 which

supports the conclusion that the legislature found a clear and present danger to exist with respect to publications of the sort included here. Nor does the Virginia Supreme Court cite to any portion of such history to support its contrary conclusion.

There is, to be sure, the finding that proceedings shall be "confidential" and that the identity of accused judges, if contained in "papers filed with and proceedings before the Commission," shall not be "divulged"; but there is not a word of legislative history to the effect that newspapers or others that learn of what has transpired in those proceedings may not disclose it. Thus, the conclusion of the decision that it is based upon "'the armor wrought by prior legislative deliberation'", *Bridges, supra,* 314 U.S. at 261 (JA 69), is simply unsupported; there is no basis for concluding that the "deliberation" adverted to in *Bridges* occurred at all—at least as regards the imposition of criminal penalties upon newspapers for publishing what they learn of the proceedings of the Commission.*

Nor does the ruling below find support in the passage by other jurisdictions of what the Virginia Supreme Court refers to as "similar" statutes. In one sense, of course, it is plainly accurate to state that the statutes of the other jurisdictions referred to by the Court are similar; in another, it is quite inaccurate. Of the other jurisdictions only *one*—Hawaii—makes it a crime to disclose any part of the proceedings held before the judicial inquiry com-

* Significantly, Professor Emerson concludes that the *Bridges* line of cases would have been decided identically, even if they had arisen under criminal statutes. T. Emerson, *The System of Freedom of Expression* 456 (1970).

mission.* Virtually all the other jurisdictions require confidentiality; none of the others criminally punishes anyone, let alone the press, for breach of that confidentiality.**

* Rule 16 of the Rules of Practice and Procedure of the Hawaii Commission for Judicial Qualification provides that:

"[a]ny commission member or individual, including the individual making the charge, who divulges information concerning the charge prior to the certification [thereof] . . . shall be guilty of a felony . . . ."

** The American Judicature Society study, *Judicial Disability and Removal Commissions, Courts and Procedures* (G. R. Winters & R. S. Lowe, eds. 1973), relied on by the Virginia Supreme Court, as updated by *Resource Materials for 5th National Conference of Judicial Disability Commissions* (E. J. Schoenbaum, ed. 1976), lists a total of 42 jurisdictions (40 states, the District of Columbia and Puerto Rico) as providing for some type of judicial disciplinary procedure.

As noted above, Hawaii is the *only* state other than Virginia to impose a criminal sanction for violation of any confidentiality requirement. Hawaii Rev. Stat. § 610-3(b)

Those constitutional, statutory or administrative provisions imposing a requirement of confidentiality are as follows: Alabama: Const. Art. 6 § 156(b), Rule 5 of the Rules of Procedure of the Judicial Inquiry Commission; Alaska: Stat. § 22.30.060, Rule 2 of the Rules of the Commission on Judicial Qualifications; Arizona: Const. Art. 6.1 § 5, Rule 10 of the Rules and Procedures of the Commission on Judicial Qualifications; California: Const. Art. 6 § 18(f), Rule 902 of Title III (Miscellaneous Rules) Div. I (Rules for Censure, Removal, Retirement or Private Admonishment of Judges); Colorado: Const. Art. 6 § 23(3)(d), Rule 3 of the Rules of Procedure of the Commission on Judicial Qualifications; Connecticut: Gen. Stat. § 51-51(c-d); Delaware: Const. Art. 4 § 37, Rule 10(d) of the Rules of Procedure of the Court on the Judiciary; District of Columbia: Code § 11-1528, Rule 21 of the Rules of the Commission on Judicial Disabilities and Tenure; Florida: Const. Art. 5 § 12(d), Rule 25 of the Rules of the Judicial Qualifications Commission; Georgia: Const. Art. 6 § 13 ¶ 3; Hawaii: Rev. Stat. §§ 610-3(a), 610-12(b), Rule 15 of the Rules of Practice and Procedure of the Commission on Judicial Qualification; Idaho: Code § 1-2103, Rule 24 of the Rules of the Judicial Council; Illinois: Const. Art. VI § 15(e), Rule 5 of the Rules of Procedure of the Judicial Inquiry Board; Indiana: Const. Art. 7

Thus, the conclusion of the Supreme Court of Virginia as to the "indispensable" nature of criminal sanctions to enforce confidentiality is all but totally unsupported outside Virginia—as well as lacking support in the legislative history within Virginia.

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§ 11, Code Ann. § 33-2.1-5-3, Rule 5 of the Rules of the Judicial Qualifications Commission; Iowa: Code Ann. § 605.28; Kansas: Stat. § 20-175 (Rule No. 607 of the Rules of the Supreme Court Relating to Judicial Conduct); Louisiana: Const. Art. 5 § 25(C), Rule 23 § 23 of the Supreme Court Rules, Rule 10 of the Rules of the Judiciary Commission; Maryland: Const. Art. IV § 4B(a), Rules 1227 (e,r) of the Rules of Procedure; Michigan: Const. Art. VI § 30(2), Rule 932.22 of the Supreme Court Administrative Rules; Minnesota: Stat. Ann. § 490.16(5), Rule S of the Rules of the Commission on Judicial Standards; Missouri: Rule 12.23 of the Rules of the Commission on Retirement, Removal and Discipline; Montana: Rev. Codes Ann. § 93-723; Nebraska: Const. Art. V § 30(3), Rev. Stat. § 24.726, Rule 2 of the Rules of the Commission on Judicial Qualifications; New Jersey: Rule 2:15-11(e) of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court; New Mexico: Const. Art. VI § 32, Rule 7 of the Procedural Rules and Regulations of the Judicial Standards Commission; New York: Jud. Law § 44 (McKinney Supp.); North Carolina: Gen. Stat. § 7A-377(a), Rule 4 of the Rules of the Judicial Standards Commission; North Dakota: Cent. Code § 27-23-03(5), Rule 4 of the Rules of Procedure of the Judicial Qualifications Commission; Ohio: Rule 21 of the Supreme Court Rules of Practice; Oklahoma: Stat. Ann. tit. 20 § 1658 (West), Rule 5 (C) of the Rules of the Council on Judicial Complaints; Oregon: Rev. Stat. §§ 1.420(2), 1.440, Rule 7 of the Rules of Procedure of the Commission on Judicial Fitness; Pennsylvania: Const. Art. 5 § 18(h), Rule 20 of the Rules of Procedure of the Judicial Inquiry and Review Board, South Carolina: Rule 34, Items 11 and 33, of the Rules of the Supreme Court; South Dakota: Const. Art. V § 9, Compiled Laws Ann. § 16-1A-4, Rule 4 of the Rules of the Judicial Qualifications Commission; Tennessee: Code Ann. §§ 17-811(2), 17-813(2); Texas: Const. Art. 5 § 1-a(10), Rule 19 of the Rules for Removal or Retirement of Judges; Utah: Code Ann. § 49-7a-38(5); Vermont: Rule 3 of the Rules of the Supreme Court for Disciplinary Control; Virginia: Const. Art. VI § 10, Code § 2.1-37.13, Rule 10 of the Rules of the Commission on Judicial Inquiry and Review, Wisconsin: Item 21 of the Code of Judicial Ethics, Rules 2 and 3(4) of the Rules of Procedure of the Judicial Commission; Wyoming: Rule 7 of the Rules of the Judicial Supervisory Commission.

Puerto Rico does not appear to require confidentiality: Const. Art. V § 11, Laws Ann. tit. 4 § 232 and App. XV thereto (Rules for the Informal Hearing Proceeding or for the Separation from Service of Judges).

III.

Va. Code § 2.1-37.13 Is Unconstitutionally Vague and Overbroad

A. *The Unconstitutional Vagueness of Va. Code § 2.1-37.13*

This Court has frequently indicated the special concern with which it views—and reads—statutes limiting freedom of expression. As the Court observed in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

See also Erznoznik v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975) ["Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."]; *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). The constitutional test of definiteness is particularly strict in the case of a criminal statute such as Va. Code § 2.1-37.13. *E.g.*, *Winters* v. *New York*, 333 U.S. 507, 515-16 (1948). And this Court has recently repeated that it takes "special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Marks* v. *United States*, 45 U.S.L.W. 4233, 4235 (U.S. March 1, 1977).

The danger of vagueness in areas affected with a First Amendment interest is particularly disturbing because "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).

The application of Va. Code § 2.1-37.13 to the publication of *The Virginian-Pilot* on October 4, 1975 runs afoul of all these cautionary strictures. The statutory language provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge as well as all testimony and other evidence . . . shall be confidential and shall not be divulged by any person to anyone except the Commission . . . ."

Here the statute is ambiguous as to both the circumstances which constitute "divulgence" and the source and type of information which may not be divulged. It may fairly be said of this statute that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Under such circumstances, it fails to give "fair warning" and it cannot stand. *Grayned*, 408 U.S. at 108.

The initial vagueness problem is created by the failure of the statute to set forth with clarity the scope of its coverage. The Commonwealth has suggested, in its motion to affirm (pp. 13-14) that because the statute prohibits "divulgence by any person to anyone except the Commission," it obviously must include Landmark. But any such reasoning is unavailing.

Despite the absolutely prohibitory nature of the statute, divulgence to *some* persons other than the Commission —*i.e.*, to the judge under investigation and his counsel—is necessarily intended.* *See, e.g.*, Va. Code § 2.1-37.12. Thus, a literal interpretation of the statute, prohibiting divulgence *by any* person *to anyone*, is inconsistent with the statutory scheme itself.

* The Commission is also authorized to "divulge" information to the legislature at the latter's request. Va. Code § 2.1-37.17:1(b).

A distinct problem has resulted from the ambiguity of the term "divulge" itself and the failure of the statute to make clear an intent to include newspaper reports and other statements by non-participants within its coverage. The use of the term "divulge," susceptible of a number of distinct meanings,* together with the failure to indicate explicitly that newspapers and other non-participants in Commission proceedings were to be covered, created a serious problem of "fair warning" with respect to the statute.** Certainly if the legislature undertook so momental a step as a total prohibition on coverage by the press

* The statute nowhere defines the term "divulge"—and as the record indicates the term is capable of several distinctly different meanings.

At trial, counsel for Landmark urged—based upon the definition contained in *Webster's Third International Dictionary* (1961) —that "divulge" concerned the first act of disclosure only and that information became public upon, and only upon, its first disclosure. (JA 11) The Commonwealth responded—based upon the definition in *Webster's Second College Edition*—that "divulge" meant "to make public." (JA 32) The decision of the Supreme Court of Virginia here at issue—relying upon yet a third dictionary [*Black's Law Dictionary* (4th ed. 1951)]—held that "divulge" meant "to disclose [information] or make it known." "Clearly", the Virginia Supreme Court ruled, Landmark violated the statute. (JA 59) But, as the conflict of the dictionaries suggests, the legal meaning of "divulge," let alone a discernible legislative intent to apply the statute to newspapers, is far less clear.

For one thing, as we have previously discussed, there is *no* legislative history on point, save only a general intent that proceedings be "confidential." Indeed, when the Virginia legislature has previously intended to adopt a statute *prohibiting* newspapers from publishing material, it has done so explicitly. Va. Code § 53-322 thus provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals. Only the fact that the criminal was executed shall be printed or published." (We do not, of course, concede the constitutionality of that statute which we believe to be facially violative of the First and Fourteenth Amendments.)

** Of course, the decision of the Virginia Supreme Court determining that the statute applies to newspapers would not cure the original ambiguity and unfairness for purposes of this conviction, even in the absence of other vagueness problems. *See Ashton* v.

of an entire area of news, one might expect some explicit statement of legislative intent.

Precise legislative drafting is required, *inter alia*, to assure that the legislature has "focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned*, 408 U.S. at 109 n.5. This consideration is a particularly telling one here where the imprecision of the statute simply reinforces the impression, left by the absence of any discussion as to the need for criminal sanctions on newspapers, that the First Amendment impact on the press of Va. Code § 2.1-37.13 was never considered by the Virginia legislature.

Other vagueness problems relate to the type of information covered. On its face, the statute is unclear as to material covered. It is susceptible of both a limiting interpretation barring only disclosure of certain specified materials filed with, or proceedings before, the Commission, as well as a broad and open-ended interpretation. It provides that:

> "*All papers filed with and proceedings before the Commission*, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), *including* the identification of the subject judge *as well as all testimony and other evidence and any transcript thereof* made by a reporter, *shall be confidential* and shall not be divulged by any person to anyone except the Commission . . . ." (emphasis added)

The Virginia Supreme Court apparently sought to clarify this point,* holding that the statute

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Kentucky, 384 U.S. 195, 198 (1966). Any other result would deprive a defendant of the "fair warning" required of all criminal statutes.

* The statute does, of course, refer to identification of the subject judge as being an item which may not be divulged. The statute itself is completely unclear, however, as to whether such identification is prohibited only when (1) obtained from a paper filed with the Commission or an account of the proceeding or (2) from any source whatever. Does the statute bar publication of the fact that the judge himself announced, in open court, that a complaint had been filed against him? *Cf. Craig*, 331 U.S. at 374; *Cox Broadcasting Corp.* v. *Cohn*, *supra*.

> "[i]n unmistakable terms . . . states that *all information concerning a proceeding before the Commission*, including the identity of the judge who is the subject of the inquiry shall be confidential . . . ." (JA 59) (emphasis added)

This interpretation allowed affirmance of the conviction despite the total absence of any evidence that the information disclosed consisted of "papers filed with and proceedings before the Commission." * But the cost of such interpretation was the exacerbation of the existing vagueness problem, a vagueness problem of immense proportions.

What is the limit to "information *concerning* a proceeding"? Does this language, for example, bar newspapers from reprinting information previously published by other newspapers or news services? Does the statute prohibit a newspaper from reporting on an open session of a house of the state legislature in which the reappointment of a

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* The Texas State Judicial Commission has apparently interpreted its own laws in a radically different manner. Texas is one of the states cited by the Supreme Court of Virginia as applying a confidentiality rule similar to its own. The Texas provision provides:

> "All papers filed with and proceedings before the Commission or a Master shall be confidential . . . provided that upon being filed in the Supreme Court the record loses its confidential character." Texas Const. Art. 5, § 1-a(10)

Despite this requirement, the Texas Commission itself felt free to publicize the fact that it intended to investigate a sitting judge. *See* discussion, *supra*, at pp. 23-24. This illustrates clearly at least one alternative reading of "all papers and proceedings." It suggests again the fatal ambiguity of the Virginia statutes.

judge investigated by the Commission was discussed? Does it bar discussion of court events which are also the subject of a complaint before the Commission?

The statute, as authoritatively construed by the Virginia Supreme Court, thus presents the classic problem of wording so vague as to deny fair warning and to present the potential for "arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Such a statute cannot survive the strict scrutiny required where speech is so directly infringed.

B. *The Unconstitutional Overbreadth of Va. Code* § 2.1-37.13

As is often the case, unconstitutional overbreadth is a close relative of unconstitutional vagueness. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Herndon* v. *Lowry*, 301 U.S. 242, 258 (1937); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *Grayned* v. *City of Rockford*, 408 U.S. at 116-117. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' *Dombrowski* v. *Pfister*, 380 U.S., at 486. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression

are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-12 (1973).

This approach has been applied most rigorously in cases which, like the present one, involve regulation of "only spoken words" rather than conduct. *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

"In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick*, 413 U.S. at 612.

The principal precondition to the application of such approach is the requirement that the state court be given an opportunity to narrow the statute. *Broadrick*, 413 U.S. at 612-15. Here the Virginia Supreme Court has been given an opportunity to narrow the sweep of the statute and has, if anything, expanded it in terms of coverage.* It has justified the statute in the broadest terms, expressly refused to consider the limitation of such justifications to specific factual circumstances, and has characterized the statute as placing "the least possible restraint upon the public interest while, at the same time, . . . assur[ing] effective functioning of the Commission." (JA 73) Under these circumstances, there can be no doubt that the state Supreme

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* It has, for example, expanded the statutory ban on divulgence of "all paper filed with and proceedings before the Commission" to cover "all information concerning" proceedings.

Court has declined to narrow the statute and cannot be expected to narrow it in the future. Its decision is thus ripe for review under the overbreadth doctrine. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216-17 (1975).

The deterrent to the exercise of legitimate First Amendment rights posed by this statute is "real and substantial." *Erznoznik,* 422 U.S. at 216. Here what is involved is a statute which is neither "narrowly drawn" nor one which, at least as it is now said to relate to the press, represents "a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick,* 413 U.S. at 611-12. In an attempt to clarify the statute, the Virginia Supreme Court has so extended the statutory sweep as to include actions which, under any interpretation of the Constitution, are protected.

As interpreted by the Virginia Supreme Court, the statute at issue makes it a crime *ever* to identify a judge who is or has been investigated by the Commission, unless charges are publicly filed against him. Thus, if a private citizen, an attorney or a newspaper believes some impropriety has prevented an incompetent judge from having formal charges filed against him, they could never disclose this view, except at the risk of imposition of criminal sanctions.* Similarly, if a complainant concluded that the

Commission had improperly rejected a complaint filed by him, he could never express his views. If a witness against a judge felt retribution had been taken against him for the giving of testimony, his disclosure of this fact to anyone other than the Commission itself or even the bringing of a lawsuit to redress this grievance would be subject to criminal sanctions, as would be the reporting of such events. Such conduct, swept within the grasp of the statute, is, of course, protected by the First Amendment. *See Cox Broadcasting Corp.* v. *Cohn, supra; Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Craig* v. *Harney, supra.* Without more, the statute must fall, because even if it is assumed that all other applications would be valid, these are prohibited and would deter legitimate speech. *See Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *see also United States* v. *Robel,* 389 U.S. 258, 265-66 (1967).

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* This sort of broad coverage is simply unnecessary to protect any of the interests identified by the Virginia Supreme Court as justifying the statute. It is the established rule that statutes infringing speech in the interests of preserving other interests must use the least restrictive means available to accomplish the legislative goal. *Buckley,* 424 U.S. at 25 (1976); *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 563-65 (1976); *Dunn* v. *Blumstein,* 405 U.S. at 343 (1972); *Shelton* v. *Tucker,* 364 U.S. at 488 (1960). The failure to employ the least restrictive means available to accomplish the legislative goal, *viz.* a restriction limited to those who participated in or were in attendance at the Commission proceedings, or to a penalty for particular disclosures having a clearly prejudicial effect on Commission proceedings, provides a distinct basis for invalidity here.

The Virginia Supreme Court has stated that the statute indeed involves the narrowest restrictions on speech possible consistent with the legislative goals. In respect of this conclusion, it asserts that "the statute does not curtail general comments or criticism concerning a judge or the conduct of his judicial affairs." (JA 73-74)

But the statute deprives the citizen of the factual basis upon which to ground such comments and "[t]he protection of the public requires not merely discussion, but information." *Sullivan,* 376 U.S. at 272, quoting *Sweeney* v. *Patterson,* 128 F.2d 457, 458 (D.C. Cir.), *cert. denied,* 317 U.S. 678 (1942). The restriction, far from being narrow, reaches the most basic elements of free expression.

CONCLUSION

It may be useful, in conclusion, to emphasize what this case is not about. It is not a case in which a newspaper seeks judicially decreed access to sealed or secret documents. It is not a case in which a newspaper challenges a statute relating to publication of allegedly "private" facts. And it is not a case involving restrictions placed on conduct or the time, place or manner of otherwise protected expression.

This is a case in which a state has subjected a newspaper to criminal punishment for truthful reporting about a proceeding concerning the fitness of a public official. Such a statute, we believe, cannot be constitutionally upheld.

In urging that Virginia may not make criminal the reporting at issue here, we do not denigrate the need for assuring the highest quality of the judiciary. Nor do we doubt the wisdom of Chief Judge Traynor's telling observation that "in the judiciary, as in every other walk of life, a bad man is as hard to lose as a good man is hard to find."* It is possible that "bad men" may be easier lost to the judiciary if there are no leaks from the Commission; but it is at least as likely that the publication of such information will expose unfit judges and unfit commissions. The hypothesis of the First Amendment is that if a choice must be made in such circumstances, it is to be made in favor of freedom.

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* Traynor, *Who Can Best Judge The Judge?*, 42 Cal.State Bar J. 225, 238 (1967).

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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